

APPEAL NO. 170862
FILED MAY 25, 2017

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was held on March 2, 2017, in (city), Texas, with (hearing officer) presiding as hearing officer. The hearing officer resolved the disputed issues by deciding that: (1) the appellant (claimant) did not sustain a compensable injury on (date of injury); (2) the injury did occur while the claimant was in a state of intoxication, as defined in Section 401.013; therefore, the respondent (carrier) is relieved of liability for compensation; and (3) because the claimant did not sustain a compensable injury, the claimant does not have disability from November 2, 2016, through February 5, 2017.

The claimant appealed, disputing the hearing officer's determinations of compensable injury, disability, and intoxication. The claimant argues on appeal that he had normal use of his physical and mental faculties. The carrier responded, urging affirmance of the disputed determinations.

DECISION

Reversed and remanded.

The claimant testified he injured his left hand when it was struck by a large block of cement when he was cleaning out a mixer using a jackhammer. A post-accident urine sample was taken from the claimant and a drug test was performed and showed the claimant tested positive for cocaine and MDMA.

Section 406.032(1)(A) provides that the carrier is not liable for compensation if the injury occurred while the employee was in a state of intoxication. Section 401.013(a)(2)(B) defines intoxication as not having the normal use of mental or physical faculties resulting from the voluntary introduction into the body of a controlled substance or controlled substance analogue, as defined by Section 481.002, of the Health and Safety Code. Section 401.013(c), amended effective September 1, 2005, provides that the voluntary introduction into the body of any substance listed under Subsection (a)(2)(B), based on a blood test or urinalysis, raises a rebuttable presumption that a person is intoxicated and does not have the normal use of mental or physical faculties.

In evidence is a report of the drug test performed on the claimant's urine sample which shows positive for MDMA and cocaine metabolite. The same report shows that the claimant testified negative for marijuana metabolites. The hearing officer both in her discussion and in Finding of Fact No. 4 states a urine sample was taken of the claimant which tested positive for marijuana. In reviewing a "great weight" challenge, we must

examine the entire record to determine if: (1) there is only “slight” evidence to support the finding; (2) the finding is so against the great weight and preponderance of the evidence as to be clearly wrong and manifestly unjust; or (3) the great weight and preponderance of the evidence supports its nonexistence. See *Cain v. Bain*, 709 S.W.2d 175 (Tex. 1986). The hearing officer’s Finding of Fact No. 4 as it pertains to the claimant testing positive for marijuana is so against the great weight and preponderance of the evidence as to be clearly wrong and manifestly unjust. Accordingly, we reverse the hearing officer’s determinations that the claimant did not sustain a compensable injury on (date of injury), and that the injury did occur while the claimant was in a state of intoxication. Because we have reversed and remanded the compensable injury and intoxication determinations, we likewise reverse and remand the hearing officer’s determination that the claimant did not have disability from November 2, 2016, through February 5, 2017.

SUMMARY

We reverse the hearing officer’s determination that the claimant did not sustain a compensable injury on (date of injury), and we remand the issue of whether the claimant sustained a compensable injury on (date of injury), to the hearing officer for further action consistent with this decision.

We reverse the hearing officer’s determination that the carrier is relieved of liability for compensation because the claimant was in a state of intoxication at the time of the claimed injury, and we remand the issue of whether the claimed injury occurred while the claimant was in a state of intoxication as defined in Section 401.013 thereby relieving the carrier of liability for compensation to the hearing officer for further action consistent with this decision.

We reverse the hearing officer’s decision that because the claimant did not sustain a compensable injury, the claimant does not have disability from November 2, 2016, through February 5, 2017, and we remand the issue of disability from November 2, 2016, through February 5, 2017, to the hearing officer for further action consistent with this decision.

REMAND INSTRUCTIONS

On remand the hearing officer is to address the issue of whether the claimed injury occurred while the claimant was in a state of intoxication in light of the evidence showing that the claimant’s post-accident urine sample tested positive for MDMA and cocaine metabolite rather than MDMA and marijuana metabolites. The hearing officer shall consider all of the evidence, make findings of fact, and render conclusions of law regarding intoxication, compensability, and disability consistent with this decision.

Pending resolution of the remand, a final decision has not been made in this case. However, since reversal and remand necessitate the issuance of a new decision and order by the hearing officer, a party who wishes to appeal from such new decision must file a request for review not later than 15 days after the date on which such new decision is received from the Texas Department of Insurance, Division of Workers' Compensation, pursuant to Section 410.202 which was amended June 17, 2001, to exclude Saturdays and Sundays and holidays listed in Section 662.003 of the Texas Government Code in the computation of the 15-day appeal and response periods. See Appeals Panel Decision 060721, decided June 12, 2006.

The true corporate name of the insurance carrier is **TEXAS MUTUAL INSURANCE COMPANY** and the name and address of its registered agent for service of process is

**MR. RICHARD J. GERGASKO, PRESIDENT
6210 EAST HIGHWAY 290
AUSTIN, TEXAS 78723.**

Margaret L. Turner
Appeals Judge

CONCUR:

K. Eugene Kraft
Appeals Judge

Carisa Space-Beam
Appeals Judge